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CITATIONS

572-879—75——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1888

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALASKA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In view of Alaska's comments regarding our acceptance of the findings of fact of the district court (*e.g.*, Resp. Br. 2, 8, 10–11, 44, 47), we must emphasize again our position in this regard. We do not quarrel with findings that, for example, particular events did or did not occur. We do take issue, however, with the legal significance and characterization of events that undisputably occurred. That the district court included many of its ultimate legal conclusions in its "Findings of Fact" does not transform these into factual findings and does not mean that the Court must accept their legal significance under a "clearly erroneous"

standard (Fed. R. Civ. P. 52(a)). Regardless of their characterization by the courts below, the issues before the Court are legal, not factual, in nature. To those issues we now turn.

A. THE FACTS RELIED UPON BY ALASKA DO NOT CONSTITUTE LEGALLY SUFFICIENT OR EFFECTIVE EXERCISES OF SOVEREIGNTY

1. Alaska contends that the United States has made "explicit claims to Cook Inlet" (Resp. Br. 8) "as an historic inland bay * * *" (*id.* at 10). If this is meant to suggest that the United States has expressly declared to other nations that we regard Cook Inlet as historic inland waters, then it is not accurate. The United States has never made such a claim; to the contrary, it has repeatedly disavowed any such claim (see U.S. Br. 19–20).

2. Beyond this, Alaska stresses certain geographic features of Cook Inlet (Resp. Br. 15–17), but omits to mention one of the most significant ones—its size. As noted by Jessup, "the size of the body of water * * * operates as a factor in hindering international acquiescence." Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 412 (1927). Cook Inlet is 47 miles wide at the headlands, as wide as 60 miles in some portions, and about 220 miles long.[1] It is an

[1] If "a mariner instinctively feels himself within the jurisdiction and domain of Alaska" (Resp. Br. 16), it is in part because of the mountains along the shores of Cook Inlet, which tend to diminish its immense breadth.

enormous body of water,[2] a fact that may be obscured somewhat by the vast size of Alaska itself. If Cook Inlet were an historic bay, it would be, by a substantial margin, one of the largest ever claimed and perhaps the largest ever recognized.[3] In light of its size, the omission of Cook Inlet from listings of historic waters (see U.S. Br. 52, n. 58) could hardly have been an oversight. Moreover, in view of the size limitations on juridical bays and the general principles of freedom of the seas, it is particularly important in regard to such a large body of water that the coastal nations have clearly exercised sovereignty *as over inland waters.*[4]

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[2] Cook Inlet is larger than the Great Salt Lake and Lake Ontario, and about the same size as Lake Erie. It also dwarfs Chesapeake Bay, Delaware Bay, and Long Island Sound, which the United States had claimed as historic bays.

[3] Descriptions of historic waters that have been claimed or recognized are found in the United Nations memorandum, *Historic Bays* (A. 693–698), and Jessup, *supra*, 383–439.

[4] There is nothing to support Alaska's argument that the correlation recognized by this Court and the *Juridical Regime* between the type of sovereignty exercised and the nature of the resulting historic title (see U.S. Br. 36–37) applies only to "straits or open seas" and not to "bays" (Resp. Br. 53). In recognizing a distinction between "historic bays" and other "historic waters" (¶ 165), the *Juridical Regime*, while acknowledging that most historic bays have been regarded as internal waters, expressly stated that as to both historic bays and other historic waters, the nature of the sovereignty exercised and acquiesced in governs the title acquired. Moreover, Alaska ignores entirely the Gulf of Fonseca in Central America, a small bay-shaped historic *territorial* sea at the western end of Nicaragua (see U.S. Br. 37, n. 37).

3. Recognizing the necessity of some exercise of sovereignty over Cook Inlet directed against foreign nationals,[5] Alaska also claims that "[o]ne of the United States' most significant assertions of authority over all of Cook Inlet took place in 1957 and 1958 when [by transmitting the Gharrett-Scudder maps] the United States communicated to Canada, in a classic manner, its claim to Cook Inlet" (Resp. Br. 34; see *id* at 43). The Gharrett-Scudder maps merely delineated the portions of the high seas in which the United States was enforcing certain salmon fishing regulations against persons and vessels subject to United States jurisdiction.[6] The record belies any

[5] The authorities cited by Alaska (Resp. Br. 40–42) acknowledge that the most relevant assertions of sovereignty are actions directed against foreign nationals. Alaska omits the important qualification to Bourquin's view that other acts (*e.g.*, the placing of beacons) present "borderline" cases in which the significance of the act depends upon other circumstances (A. 742). Similarly, the *Juridical Regime* (¶ 94) notes the view that while action by a state under its municipal law is "essential" it is "not in itself sufficient to establish the title * * *" (A. 742). This is consistent with our view, for if a state treats waters as inland waters by enforcing its laws against foreign nationals, enforcement of its laws there against its citizens as well would logically if not inevitably follow, while the failure of a state to regulate as to its citizens with respect to assertedly inland waters would tend to undercut any claim that the waters were part of the territory of the coastal nation. In short, actions against foreign nationals constitute the *sine qua non* of a non-explicit claim of historic title, absent which there is no basis for concluding that other nations have acquiesced in an assertion of sovereignty.

[6] The Gharrett-Scudder maps derived from a joint United States-Canadian enforcement effort to regulate salmon fishing in the high seas. Pursuant to international agreement, imple-

suggestion that those maps were intended by the United States, or perceived by Canada, as an internationally-significant assertion of sovereignty.

The maps were transmitted by Interior to the State Department with the explicit understanding that the lines shown were "drawn solely for the purpose of fisher[ies] management" and did not bear "any relationship to lines delimiting the territorial waters of the United States" (A. 869; cf. A. 832).[7] In fact, the Gharrett-Scudder maps used straight baselines (see, *e.g.*, chart 8502, following A. 1208), contrary to the well-established foreign relations posture of the

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mented by the North Pacific Fisheries Act of 1954, 68 Stat. 698, as amended, 16 U.S.C. 1021, *et seq.*, in 1956 the United States prohibited certain salmon fishing by persons or vessels subject to the jurisdiction of the United States within specified areas seaward of "the waters of Alaska" as delineated by lines connecting the headlands of all bays. 21 Fed. Reg. 5446–5447, 50 C.F.R. (1957 ed.) 101.19 and part 130. Agreeable in principle to the United States' intention to use "the waters of Alaska" so defined as the basis for enforcement efforts against persons subject the United States' jurisdiction, the Canadian representatives at a joint conference wished to see a chart showing more definitely those waters (A. 1127). Accordingly, Interior Department employees Gharrett and Scudder prepared charts depicting the boundaries of "the waters of Alaska" as defined in the salmon fishing regulations.

[7] The lines shown were developed primarily to promote fisheries purposes, as viewed by the Interior Department staff responsible for Alaska commercial fisheries, and "interpretation of international waters was not a primary concern" (A. 834, 1038; see A. 294–295, 589). The definition of the "waters of Alaska" adopted in 1956 with reference to salmon fishing in the North Pacific was in 1957 used generally in the Alaska fisheries regulations (see U.S. Br. 15–16, n. 18).

United States (A. 828–829; see, *e.g.*, *United States* v. *California*, 381 U.S. 139, 167–169; *United States* v. *Louisiana*, 394 U.S. 11, 72–73), and they enclosed a number of areas (in addition to Cook Inlet) that the United States and other nations have regarded as international waters, such as Shelikof Strait and other portions of the high seas.

While the letter formally transmitting the Gharrett-Scudder charts to Canada simply described the lines depicted as being the basis of the Alaska salmon fishing regulation (A. 1201), that was not the only communication between the countries on this subject (see A. 871–872, 1036–1037, 1044, 1116–1135). As Gharrett stated, the charts were submitted to Canada "with the explanation that this was the manner in which the regulations applied to U.S. fishermen. *We definitely avoided any reference to International or Territorial waters*" (A. 837; emphasis added). Thus, in no relevant sense did the transmission of the Gharrett-Scudder maps constitute a claim of international sovereignty, and they were submitted in a context (see *supra*, n. 6) that effectively disclaimed any such intentions.

4. With respect to our assertion that foreign vessels were permitted to transit and stop, and to fish, in the disputed portions of lower Cook Inlet (U.S. Br. 13, 44–45), Alaska contends that the record is to the contrary and that such unhindered passage of foreign vessels is of no relevance to its claim that Cook Inlet is inland waters. We deal with the record in the mar-

gin,[8] and focus on the legal significance of such passage.

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[8] Alaska correctly notes that the portion of our summary of argument it quotes (Resp. Br. 54) contains no record citations. The argument proper, however, contains substantiated discussions of both the deliberate decision of the responsible United States officials not to interfere with foreign fishing in Cook Inlet in 1952 because the vessels were more than three miles from the shore (U.S. Br. 13)—a highly significant incident ignored by Alaska—and of other foreign vessels fishing, navigating or at anchor in Cook Inlet (U.S. Br. 44–45). Such events were testified to by federal fisheries officials (A. 16–17, 21, 232, 262–263, 360–361, 456, 507–508, 545, 602). Of course, not all such witnesses saw foreign vessels actually fishing. Some who did not expressed the personal opinion—years, often decades, after the fact—that if they had seen foreign fishing beyond three miles they would have taken enforcement action. Although Alaska regarded such hypothetical opinions as "irrelevant" in the district court (*e.g.*, A. 265), it now relies heavily upon them (Resp. Br. 24–26, 42, 47). Such after-the-fact speculation is of little relevance or weight when compared to the contemporaneous records of a policy decision against enforcement of the fisheries laws against foreign vessels more than three miles from the shore of Cook Inlet, coupled with acknowledged doubts that Cook Inlet could be regarded as an historic bay (A. 772–773, 802–803).

We are unable to perceive the significance attributed by Alaska to the last two sentences of the memorandum of the Solicitor of the Interior Department concerning the enforceability of the fisheries regulations against foreign vessels fishing more than three miles from the shore of Cook Inlet (Resp. Br. 30–31). If the references in the fisheries laws to "territorial waters" were not "strictly construed," it could only mean that the laws would directly regulate fishing in the high seas—which the United States could do, prior to 1966, only as to its citizens. See 16 U.S.C. 1091, *et seq.* Alaska's attempt to reconcile Day's contemporaneous memorandum with his recollections two decades later (Resp. Br. 25, 30) ignores the explicit recognition in his memorandum that portions of Cook Inlet were "extra-territorial waters (*i.e.*, beyond three miles) * * *" (A. 803).

The *Juridical Regime* explicitly states (¶ 164) that "if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea" (A. 751). Alaska suggests that the presence of foreign vessels in Cook Inlet no more bars it from becoming inland waters than the presence of foreign vessels in San Francisco Bay makes it territorial sea (Resp. Br. 55).

A crucial difference, however, is whether the foreign vessels are present as a matter of right (as they could be in the high seas or the territorial sea) or as a matter of sufferance or permission (as they could be only in inland waters). As the proponent of the claim that Cook Inlet is inland waters, Alaska had the burden of proving that foreign vessels were present in Cook Inlet only by permission, whether through explicit authority[9] or perhaps established custom.[10] Yet, Alaska asserts that the record is silent on this point (*ibid.*) on which its case depends. In fact the record is not silent, for it contains numerous indications that foreign vessels were thought to have the right to navigate in Cook Inlet, and even to fish, beyond the three-mile limit (see p. 7, *supra*, n. 8; U.S. Br. 13–14).

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[9] Federal regulations require the masters of foreign vessels to give 24 hours advance notice before arriving at any port or place within the navigable waters of the United States. 33 C.F.R. 124.10.

[10] The district court's finding that Cook Inlet "has never been a waterway for intercourse between nations" (Pet. App. 23a) makes it unlikely that the presence of foreign vessels in Cook Inlet, if inland waters, could be explained on the basis of "international custom" (Resp. Br. 55).

B. ALASKA FAILED TO ESTABLISH THE REQUISITE CONTINUITY OF EXERCISE OF INLAND WATER SOVEREIGNTY FOR A CONSIDERABLE PERIOD OF TIME

Even on Alaska's view that regulation of fishing by foreign nationals is a sufficient exercise of sovereignty to establish historic title over Cook Inlet as inland waters, it has failed to establish that such sovereignty has been exercised "continuously" for a "considerable" period of time, as Alaska acknowledges it must do (Resp. Br. 45). Foreign fishing vessels did not indicate much interest in fishing in Cook Inlet until the 1940's and 1950's,[11] during which period the record documents Canadian halibut fishing there. Alaska attempts to brush aside this evidence with the statement that "most of the intrusions took place after the commencement of this suit * * *" (Resp. Br. 47). But this is not accurate.[12]

Alaska also endorses the district court's conclusion that historic title in the United States had already "ripened" before such intrusions (*ibid.*). Although

[11] There is no basis for Alaska's assertion that the limited foreign fishing in Cook Inlet demonstrates the "success" of United States enforcement of its fisheries regulations (Resp. Br. 33), rather than a preference for less remote or more productive fishing areas.

[12] Fully 60 percent of the documented instances of foreign fishing in Cook Inlet occurred at various times between 1943 and the commencement of this suit in 1967 (A. 804–809, 814, 818–820, 823–827). Much of the fishing by Canadian vessels was subsequent to transmission of the Gharrett-Scudder charts to Canada in 1957, indicating that Canadians did not thereafter regard Cook Inlet as inland waters.

Alaska fails to specify when that ripening occurred, it now relies most heavily on the transmission of the Gharrett-Scudder maps in 1957 and the Shelikof Strait seizures in 1962. Quite obviously, if the ripening of historic title cannot be established without those events, the requisite sovereignty had not been exercised for a "considerable" period of time when this suit was begun in 1967.

C. ALASKA FAILED TO ESTABLISH ACQUIESCENCE BY FOREIGN NATIONS IN ANY EXERCISE OF SOVEREIGNTY OVER COOK INLET AS OVER INLAND WATERS

Alaska argues that no foreign nation "has protested the claim to Cook Inlet as an historic inland bay by the United States and Alaska" (Resp. Br. 10; see *id.* at 42). However, because the United States never made such a claim (see p. 2, *supra*), there was no occasion for foreign nations to protest,[13] and, to the extent that Alaska made such a claim in connection with the Shelikof Strait seizures, Japan did protest.[14]

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[13] Even if some of the actions taken by the United States could be regarded as equivalent to a claim of Cook Inlet as inland waters, it cannot be said, as Alaska asserts (Resp. Br. 50, n. 29), that *all* such actions were sufficiently "open and notorious" to oblige foreign nations to protest. This is true of domestic statutes and regulations and especially of boardings and arrests of American vessels. The transmission of the Gharrett-Scudder charts—if relevant—could affect no country but Canada, as they were otherwise not made public.

[14] There is no basis for Alaska's assertion that Japan's formal diplomatic protest was ineffective (Resp. Br. 50, n. 29). A single such protest may be sufficient if the circumstances require no more. Here, Japan has had no occasion to take fur-

D. ALASKA DISREGARDS THE PRE-EMINENT POWER OF THE UNITED STATES CONCERNING FOREIGN RELATIONS AND NATIONAL BOUNDARIES AND THE ADVERSE INTERNATIONAL IMPLICATIONS OF THE DECISION BELOW

We agree with Alaska that the United States cannot "distort" its power over foreign relations to ignore past events giving rise to historic title (Resp. Br. 13, 58), but past events are decisive only when it is clear beyond doubt that historic title has already ripened. In other cases, the foreign policy power of the United States is decisive. As we have shown, the evidence supporting Alaska's claim of historic title was hardly "clear beyond doubt" and rejection of that claim here does not distort, but is entirely consistent with, our traditional foreign policy position (see U.S. Br. 33–35).[15] In its foreign relations the United States would

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ther action. Alaska refers to the adherence of "the Japanese * * * to its [sic] promise not to fish" in Cook Inlet (Resp. Br. 59), but it is clear that the agreement was the unauthorized act of the private Japanese fishermen involved (see U.S. Br. 18), and the absence of subsequent fishing there cannot be said to be or reflect action or inaction of the Japanese government. In any event, the absence of subsequent fishing by Japanese vessels does not negate the protest of the Japanese government (cf. Resp. Br. 48, n. 26a), because acquiescence may be based only on the action (or inaction) of foreign governments (cf. *Juridical Regime* ¶¶ 106–133 (A. 744–747)), not of their citizens, just as sovereignty may be exercised only by governmental action (see U.S. Br. 40).

[15] Alaska seems to suggest that the United States' claim of jurisdiction over Long Island Sound is in some way inconsistent with its position concerning Cook Inlet (Resp. Br. 49,

not acknowledge that historic title to inland waters had accrued on the basis of the evidence comparable to that underlying Alaska's claim (see Pet. App. 67a–72a), and affirmance of the decision below would hinder the United States in resisting expansive territorial claims of other nations based on assertions of historic title.[16]

CONCLUSION

For the reasons stated in the Brief for the United States and in this Reply Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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n. 28). There is no inconsistency. Long Island Sound, less than half the size of Cook Inlet, is only five miles wide at its opening to the sea. More than 100 years ago its status as part of the territory of the United States (as it was previously part of the territory of the British Empire) was recognized and asserted, consistently with the frequent, undisputed historical assertions of inland water sovereignty. *Mahler* v. *Norwich & N.Y. Transp. Co.*, 35 N.Y. 352; see *The J. Duffy*, 14 F. 2d 426 (D. Conn.).

[16] Alaska makes no attempt to justify the district court's rejection of the United States' disclaimers of jurisdiction over Cook Inlet as inland waters on the basis of its qualitative assessment of the research underlying them. Rather, Alaska now asserts that the disclaimers should be disregarded, implying that they "were all written after" the State Department's response to the Japanese protest to the Shelikof Strait seizure (Resp. Br. 59). In fact, the first disclaimer was dated May 3, 1962 (A. 755–757; see A. 611)—the date of the Japanese protest (U.S. Br. App. A)—and the United States response was dated June 19, 1962 (A. 1155–1156).

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